Re Ong Thim Kuang; ex p Public Bank Bhd and other cases

HIGH COURT (KOTA BHARU) — BANKRUPTCY NOS 29–148 OF 1993, 29–149 OF 1993 AND 29–150 OF 1993
SURIYADI J
1 FEBRUARY 2000

Bankruptcy *— Petition — Service — Service by substituted service — Judgment debtor not served with sealed copy of creditor's petition — Photostated copy of petition annexed to affidavit of service — Whether effective service — Whether formal defect or irregularity in affidavit can be cured if debtor is not misled — Bankruptcy Rules 1969 rr 109 & 111(2) — Bankruptcy Act 1967 s 131*

The respondent commenced bankruptcy proceedings against the appellant and served the creditor's petition on the appellant by way of substituted service. The appellant filed notices of objection against the bankruptcy petition on the grounds that r 109 of the Bankruptcy Rules 1969 ('the Rules') was contravened as the creditor's petitions that were served by substituted service were not sealed copies. It was also contended that r 111(2) of the Rules was also contravened as a photostated copy of the petition was annexed to the affidavit of service.

Held, dismissing the appeal with costs:

(1) Even though r 109 provided for the personal service of a sealed copy of the petition, r 110 which regulated substituted service was silent as to the delivery of a sealed copy, character, form or quality of the petition. As such, much will depend on the order for substituted service. On the facts, as the order was silent as to the format of the petition, the respondent was at liberty to exhibit the petitions in a format they thought fit, so long as the appellant was not prejudiced by it. Further, the question of the admissibility of the petitions which were photostated copies did not arise as s 2 of the Evidence Act 1950 states that the Evidence Act is not applicable for affidavit based hearings (see pp 445I–446G).

(2) Even though the photostated copy of the petition was annexed to the affidavit of service, in spite of the defect or irregularity, by virtue of s 131 of the Bankruptcy Act 1967, it is valid and sufficient as no substantial injustice was caused to the appellant (see p 414G–H); *Re Samuel Pakianathan a/l Jabamanickam; ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 followed.

[Bahasa Malaysia summary

Responden telah memulakan prosiding-prosiding kebankrapan terhadap perayu dan menyerahkan petisyen pemiutang ke atas perayu secara penyampaian ganti. Perayu telah memfailkan notis-notis bantahan terhadap petisyen kebankrapan atas alasan bahawa k 109 Kaedah Kebankrapan 1969 ('Kaedah tersebut') tidak dipatuhi kerana petisyen pemiutang yang telah diserahkan secara penyampaian ganti

bukanlah salinan yang bermeterai. Ia juga dihujahkan bahawa k 111(2) Kaedah tersebut juga telah dilanggar kerana salinan fotostat petisyen tersebut dilampirkan di dalam afidavit.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun k 109 memperuntukkan serahan secara peribadi salinan bermeterai petisyen tersebut, k 110 yang mengawal penyampaian ganti adalah senyap berkenaan dengan serahan salinan bermeterai, jenis, bentuk atau kualiti petisyen tersebut. Oleh itu, banyak yang bergantung kepada perintah penyampaian ganti tersebut. Berdasarkan fakta-fakta, oleh kerana perintah adalah senyap berkenaan dengan format petisyen tersebut, responden bebas untuk mengekshibitkan petisyen tersebut di dalam format yang mereka berpendapat adalah sesuai, selagi perayu tidak diprejudiskan olehnya. Selanjutnya, persoalan kebolehterimaan petisyen-petisyen tersebut yang merupakan salinan yang difotostatkan tidak timbul kerana s 2 Akta Keterangan 1950 menyatakan bahawa Akta Keterangan tidak terpakai untuk perbicaraan yang berdasarkan afidavit (lihat ms 445I–446G).

(2) Salinan petisyen yang difotostatkan yang dilampirkan bersama afidavit penyampaian, walaupun dengan kecacatan dan luar aturan, menurut s 131 Akta Kebankrapan 1967, adalah sah dan mencukupi oleh tiada ketidakadilan yang besar telah diakibatkan kepada perayu (lihat ms 414G–H); *Re Samuel Pakianathan a/l Jabamanickam; ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 diikut.]

Notes

For cases on service of creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1902–1903–4321.

Cases referred to

Au-Yong v Dicum & Anor [1963] MLJ 349 (refd)
Haji Yahya Lampang, Re; ex p Sabah Development Bank Bhd [1987] 2 MLJ 488 (refd)
Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 (refd)
Lim Gait Tong v Kung Hean Chow [1970] 2 MLJ 173 (refd)
Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233 (refd)
Samuel Pakianathan a/l Jabamanickam, Re; ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 (folld)
V David, Re; ex p United Asian Bank Bhd [1991] 2 MLJ 127 (refd)

Legislation referred to

Bankruptcy Act 1967 s 131
Bankruptcy Rules 1969 rr 99(2), (3), 101(1), 109, 110, 111(2)
Evidence Act 1950 s 2

Asmah bte Azhari (*Messrs C Jegathesan*) for the appellant/judgment debtor. A

Nik Haizam bte Nik Jaffar (*Rithauddeen & Aziz*) for the respondent/judgment creditor.

Suriyadi J: On 8 June 1990, the deputy registrar ordered three 'notis bantahan' of the judgment debtor against three bankruptcy petitions be dismissed with costs. On that date, as the above three matters suffered similar afflictions, the court decided to focus on one case, with the decision binding on the rest. Being dissatisfied with the decision, the appellant filed the notice of appeal as per encl 20. As the matter before me was a rehearing, I decided to follow the same technique and concentrated only on one case, which was mercifully agreed upon by all parties. The three main grounds of objection posed by the appellant were that: B C

(i) the creditor's petitions served on the appellant by way of substituted service were not sealed copies thus contravening r 109 of the Bankruptcy Rules 1969;

(ii) the affidavit of service did not annex a sealed copy of the petition but had instead annexed a photostated version and hence contravening r 111(2) of the Bankruptcy Rules; and D

(iii) the affidavit signed on behalf of the creditor, in particular by one Yee Kin Lan, was not an authorized person. E

To appreciate the premises of the above objections, it is pertinent to understand not only the initial stages of the processes but the long process of a bankruptcy proceeding. This process will invariably begin with the creditor having successfully obtained a final judgment or some final order from a competent court beforehand. Once that judgment or order continues to remain unsatisfied, and the debtor having committed an act of bankruptcy, which in effect is a statutory test of insolvency, the proper bankruptcy proceedings may thereupon be launched by the creditor. It is quite safe to say that more often than not a petitioner will serve a bankruptcy notice on the debtor. In the wake of its non-compliance a petition ensues, and if successfully proved a receiving order may be granted. Retracing our steps to that bankruptcy notice, it must, inter alia, be in a prescribed form, with the judgment sum stated and the period indicated for the satisfaction of the debt, the consequences of non-compliance, etc. The court, if satisfied, will mete down the receiving order, and later if pursued by the creditor an adjudication order be given. Once an adjudication order is pronounced the debtor is effectively a bankrupt. F G H

The repercussion of being declared a bankrupt is exceedingly distressing, to say the least, in that not only is the debtor much maligned in the eyes of his peers, but unable to hold certain positions in companies, prevented from obtaining credit from financial institutions and a host of other restrictions. With such a prohibitive sanction, it is little wonder that Parliament has seen it fit to promulgate the Bankruptcy Act 1967 together with the consequential rules. In as much as there are protections accorded to the debtor, the creditor's position is not compromised or suffocated to I

A the extent of effectively unseating him from his final judgment. Section 131 of the Bankruptcy Act in crystal clear terms lay down that:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the
B defect or irregularity and that the injustice cannot be remedied by any order of that court.

Courts in the past have not been shy in resorting to the above provision whenever technical issues have popped-up, especially when the prescribed rules have not been meticulously adhered to. In the current case, the debtor has strenuously alleged that the creditor has contravened two important
C rules, apart from having the supporting affidavit affirmed by one Yee Lin Lan who is not an authorized person. I am dismissing outright the objection pertaining to the latter matter as there is no merit to it. I now return to the more pressing matter of rr 109 and 111(2) of the Bankruptcy Rules 1969, which were supposed to have been contravened. The debtor complained
D that the petitions served on him, and that annexed in the proof of service affidavit were unsealed. So, are they seriously flawed enough for the court to entertain the notis bantahan as per encl 15, and allow the appeal? It would appear, and admitted by the creditor, that the impugned petitions served on the debtor by way of substituted service were photostated copies.

To appreciate my decision, it is perhaps appropriate if I were to touch
E on r 99(2) of the Bankruptcy Rules 1969 first and thereafter followed by the other provisions. The said r 99(2) provides that the creditor or debtor (depending on the petition) shall lodge with the registrar sufficient number of copies of the petition. They are to be sealed and issued, and interestingly, for service. No specific number is mentioned. Reading the rules further, it
F would appear that, barring legal complications, the creditor will require no less than four sealed copies, one for the Official Assignee (r 99(3)), a copy left for the court (r 101(1)), one for personal service (r 109), and a copy as an annexed exhibit in the proof of service affidavit (r 111(2)). But still, that does not explain, for purposes of this case why these sealed copies were not utilized in compliance with the rules, especially when it is relatively easy to
G obtain additional copies from the court. The creditor's counsel informed me that it was the practice before, in the Kota Bharu High Court, to extract only two sealed copies. Therefore, as admitted in this case, as one was retained by the court, the petitioner had one less sealed copy; and hence perhaps the reason why photostated copies were resorted to. If courts can set guidelines as to the exact number of sealed copies to be filed, problems
H of this nature may be reduced. As it were, I certainly could not default the petitioner completely as the rules are intertwined, voluminous, and certainly not that easy to follow.

As I intend to resolve the issue of the copies used in the substituted service first, I now take the further step of drawing attention to specific
I rules, particularly rr 109 and 110. Pursuant to the former rule, the law promulgates that the petition shall personally be served by delivering a sealed copy of the petition on the debtor. In the event prompt personal service cannot be effected, the court may order substituted service, to be

effected in such manner as it thinks fit. This is found in r 110. Scrutinizing this latter provision, it is interesting to note that it is silent as to the delivery of a sealed copy, or for that matter, the character, form or quality of the petition. Much will depend on the order pronounced by the court. That being so, it is thus quite appropriate if the relevant court order, ie the one pronounced on 25 January 1994, be perused. Again the order is silent as to the format of the petition. It merely orders that a copy of the creditor's petition each be exhibited at the relevant addresses; again silent as to whether they ought to be sealed or not. As a rider, I ought to remark that such an order not only was pragmatic but also logical. An impossible situation would have arisen if the court had ordered the petition be advertised in some vernacular newspaper, and a sealed copy be exhibited. That being the situation, I am satisfied that the creditor was at liberty to exhibit the petitions in a format he thought fit, conditional on the debtor not being prejudiced by them. The photostated copies clearly had laid down the case number, the creditor and debtor's names, the amount owed by the latter up to 28 January 1993, that the debtor had already committed an act of bankruptcy by 15 May 1993 when the bankruptcy notice personally served on him on 28 February 1999 had remained unsatisfied, with the contents and format of the petition being impeccably correct. What could not be denied by the debtor is that the bankruptcy notice served on him was a sealed one. This petition also clearly indicated the hearing date to be 12 January 1994, with the hearing to be held at the High Court of Malaya, Kota Bharu. Based on all these reasons, the debtor cannot be heard to complain that he had been misled or prejudiced in any way (*Re Haji Yahya Lampang; ex p Sabah Development Bank Bhd* [1987] 2 MLJ 488). To reiterate, not only does r 110 not indicate that the served copy must be sealed, but the exhibited copies in this case were also sufficiently clear.

Based on the above reasons, there is thus absolutely no necessity for me to seek recourse to s 131 of the Bankruptcy Act to validate the action. No questions of there being any formal defect or irregularity exist with regard to this first legal objection. Whether the petitions are inadmissible, as they are photostated copies, I feel disposed to reject such an assertion as s 2 of the Evidence Act 1950 states that the latter Act is inapplicable for affidavit based hearings.

I now zero in on the issue of the unsealed copy, or to be exact the photostated copy attached to the affidavit of service. This legal poser was raised by the debtor as r 111 provides that a sealed copy of the petition shall be annexed as an exhibit to that latter affidavit. Reading that provision in isolation, the debtor may be justified in asserting that the creditor had infringed the legislative requirement, and hence entitled to see the bankruptcy proceedings defeated. In spite of that defect and or irregularity I believe the proceedings are still valid. I do believe that no substantial injustice had been caused by them (s 131 of the Bankruptcy Act; *Rengasamy Pillai v Comptroller Of Income Tax* [1970] 1 MLJ 233; *Re V David; ex p United Asian Bank Bhd* [1991] 2 MLJ 127; *Au-Yong v Dicum & Anor* [1963] MLJ 349). In the case of *Lim Gait Tong v Kung Hean Chow* [1970] 2 MLJ 173 at p 174A–B, Azmi LP had occasion to say:

A It cannot reasonably be said that the failure to file a copy of the advertisement has effected the service of the bankruptcy notice and the creditor's petition on the debtor.

One must bear in mind that once the creditor's petition has been served by way of substituted service, it is deemed to have been served. Following that same argument of Azmi LP, and by analogy, it cannot be said that the B creditor's petition annexed to the proof of service affidavit, albeit a photostated copy, could have 'effected the service', or caused any substantial injustice to the debtor. I also find solace in the case of *Re Samuel Pakianathan all Jabamanickam; ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 where Kamalanathan Ratnam JC (as his Lordship then was) C held that even though only a true copy of the creditor's petition, and not a sealed copy was annexed to the affidavit of service, that was sufficient. On that score too, the impugned copy in this case is sufficient enough. Finally, the other reasoning advocated earlier to buttress my views pertaining to the usage of the photostated copies for the substituted service, is equally valid and applicable here (*Kamaruddin bin Mohamed v United Motor Works (M)* D *Sdn Bhd* [1982] 1 MLJ 126).

Based on the above reasons, I dismiss the appeal with costs. On the basis of the earlier agreement by the contending parties, I also dismiss the other two appeals with costs.

Appeal dismissed with costs.

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Reported by Chin En Tek

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